A

Chandirasegaran a/l Ramasamy (suing for himself and as the lawful administrator for Thumilan a/l Chandirasegaran (deceased)) v Malaysian Indian Hairdressers Association

B

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-11ANCC-7–04 OF 2023
WAN MUHAMMAD AMIN J
C 16 DECEMBER 2024

Limitation — Insurance policy — Accrual of cause of action — Deceased's estate sued insurer of accident policy for payment for deceased's death in road accident and
D *for bereavement more than six years after the death — Whether estate's claim was time-barred under s 6 Limitation Act 1953 — Whether cause of action accrued to estate on date deceased died from the accident and not when insurer repudiated liability under the policy — Whether payment under policy was not triggered when claim was made but when accident causing death or disability happened*
E *— Whether insured's riding of motorcycle without valid licence at time of accident was 'unlawful act' covered by exclusion clause in policy entitling insurer to avoid payment*

The appellant was the administrator of the estate of his son, Thumilan ('the
F deceased'), who died in a road accident on 7 September 2016 whilst riding a motorcycle without a valid licence to do so. At the material time, the deceased was undergoing a hair-dressing and hair-cutting course with an association that had purchased a group personal accident insurance policy ('the policy') from the respondent for its students including the deceased. Following the deceased's
G death, the association claimed for payment under the policy but the respondent, on 26 July 2017, denied liability to pay on the ground that the deceased's act of riding the motorcycle without a valid licence was an 'unlawful act' under the exclusion clause in the policy. The appellant filed a civil action in the magistrate's court against both the association and the respondent claiming
H payment of RM80,000 under the policy for 'accidental death' and for 'bereavement allowance'. On the association's application, the magistrate struck out the claim against the association and the action proceeded only against the respondent. Pursuant to O 33 r 2 and/or r 5 of the Rules of Court 2012, the respondent applied for summary determination of the suit based on
I 11 questions of law and fact. The questions included issues of privity of contract, limitation period, compliance with policy conditions, whether the deceased's riding of the motorcycle without a valid licence was an unlawful act that entitled the respondent to avoid the policy, and the applicability of s 7(3B) of the Civil Law (Amendment) Act 2019. After hearing the application, the

magistrate dismissed the appellant's claim on finding that: (a) although there was privity of contract between the appellant/deceased and the respondent, the claim was time-barred under s 6 of the Limitation Act 1953 as the suit was filed (on 29 September 2022) more than six years after the cause of action accrued on the date of the deceased's death on 7 September 2016. The magistrate held that the cause of action did not commence from the date of the respondent's repudiation of the policy as the policy was not a 'claims-made' policy; and (b) the deceased's act of riding the motorcycle without a valid licence was an unlawful act under the Road Transport Act 1987 and under the exclusion clause in the policy entitling the respondent to deny liability. In the instant appeal, the appellant contended that the magistrate's decision was wrong because: (i) the cause of action arose when the claim was repudiated by the respondent and not on the date of the deceased's death and therefore the suit was filed within the limitation period; and (ii) not having a valid licence to ride the motorcycle was not the direct or indirect cause of the deceased's death; hence, it could not be a ground for the respondent to deny liability under the policy.

Held, dismissing the appeal and affirming the magistrate's decision:

(1) The policy in this case was an indemnity insurance policy and not a 'claims-made' policy as contended by the appellant. The policy clearly stated that the respondent's obligation to pay was triggered by the occurrence of the insured event, ie, the death or disablement of the insured person resulting from accidental injury. The benefit became payable upon the happening of this event subject to the terms and conditions of the policy. In contrast, in a 'claims-made' policy, coverage was triggered when a claim was made against the insured during the policy period, regardless of when the event giving rise to the claim occurred. The policy here did not have such a triggering clause. The mere fact that a claim had to be made to the insurer did not convert the policy herein into a 'claims-made' one (see paras 36–37).

(2) The magistrate was right in holding that the cause of action accrued on the date of the deceased's death from the accident on 7 September 2016 and not on the date the claim was repudiated by the respondent and that the appellant's claim was therefore time-barred under s 6 of the Limitation Act 1953 as the suit was filed only on 29 September 2022 (see paras 43 & 45).

(3) The magistrate was right in finding that the deceased's act of riding the motorcycle without a valid licence at the time of the accident constituted an 'unlawful act' within the meaning of Exclusion 1 of the policy, entitling the respondent to deny liability (see para 51).

(4) The key phrase in Exclusion 1 that supported the respondent's position was 'in connection with'. This phrase was broad and expansive. It did

not necessitate a direct or proximate causal relationship but denoted a more general nexus or link. The phrase suggested that the policy intended to exclude from coverage not just deaths directly caused by unlawful acts but also deaths that were connected to or associated with unlawful acts in a broader sense. Riding a motorcycle without a valid licence was an unlawful act under the Road Transport Act 1987. The death occurred whilst the unlawful act was ongoing. In that sense, the death was connected to the unlawful act. The unlawful riding and the death were not unrelated events but were linked by temporal and circumstantial coincidence (see paras 52–54).

(5) The appellant's argument that the death was not directly or indirectly caused by the unlicensed riding of the motorcycle, whilst having some logical force, narrowed the scope of the exclusion clause contrary to its plain language. The appellant's interpretation limited the exclusion to situations where the unlawful act directly caused the death, even though the words 'in connection with' were deliberately used. There was no ambiguity in the exclusion clause which did not require the unlawful act to be the cause of the death; it sufficed that the death was connected to the unlawful act. That connection was clearly present here (see paras 55 & 57–58).

(6) The magistrate was not wrong in not addressing the applicability of s 7(3B) of the Civil Law (Amendment) Act 2019, which was relied upon by the appellant for his bereavement claim. There was no necessity for the magistrate to have considered that section because it was clearly inapplicable to the appellant's claim which was based on an alleged breach of contract by the respondent and not based on tort. The fact that the claim arose from the death of the deceased did not change the fundamental nature of the claim as a contractual one (see paras 61, 71 & 73).

(7) Section 7(3B) referred to the assessment of damages under para (3)(A) which, in turn, dealt with claims for damages for personal injuries arising out of a tort. The entire scheme of s 7 was focused on tortious claims. There was nothing in the language of s 7(3B) or indeed in any part of s 7, that suggested that it was intended to apply to contractual claims. Moreover, s 7(3B) only applied to tortious claims where the cause of action accrued on or after 1 September 2019 (see paras 67–69).

(8) The magistrate correctly found that the appellant had privity of contract with the respondent (see para 83).

[Bahasa Malaysia summary

Perayu adalah pentadbir harta pusaka anaknya, Thumilan ('si mati'), yang meninggal dunia dalam kemalangan jalan raya pada 7 September 2016 semasa menunggang motosikal tanpa lesen yang sah. Pada masa material, si mati

sedang menjalani kursus dandanan rambut dan memotong rambut dengan sebuah persatuan yang telah membeli polisi insurans kemalangan diri berkumpulan ('polisi') daripada responden untuk pelajarnya termasuk si mati. Berikutan kematian si mati, persatuan menuntut bayaran di bawah polisi namun responden, pada 26 Julai 2017, menafikan liabiliti untuk membayar atas alasan bahawa perbuatan si mati menunggang motosikal tanpa lesen yang sah adalah 'perbuatan menyalahi undang-undang' di bawah klausa pengecualian dalam polisi. Perayu memfailkan tindakan sivil di mahkamah majistret terhadap kedua-dua persatuan dan responden yang menuntut bayaran RM80,000 di bawah polisi untuk 'kematian akibat kemalangan' dan 'elaun berkabung'. Atas permohonan persatuan, majistret membatalkan tuntutan terhadap persatuan dan tindakan itu hanya diteruskan terhadap responden. Menurut A 33 k 2 dan/atau k 5 Kaedah-Kaedah Mahkamah 2012, responden memohon penentuan terus saman berdasarkan 11 persoalan undang-undang dan fakta. Persoalan-persoalan itu termasuk isu priviti kontrak, had masa, pematuhan syarat-syarat polisi, sama ada si mati menunggang motosikal tanpa lesen yang sah adalah perbuatan yang menyalahi undang-undang yang melayakkan responden untuk mengelak polisi, dan kebolehgunaan s 7(3B) Akta Undang-Undang Sivil (Pindaan) 2019. Selepas mendengar permohonan itu, majistret menolak tuntutan perayu kerana mendapati bahawa: (a) walaupun terdapat priviti kontrak antara perayu/si mati dan responden, tuntutan itu dihadkan di bawah seksyen 6 Akta Had 1953 kerana saman itu difailkan (pada 29 September 2022) lebih daripada enam tahun selepas punca tindakan terakru pada tarikh kematian si mati pada 7 September 2016. Majistret memutuskan bahawa punca tindakan tidak bermula dari tarikh penolakan polisi oleh responden kerana polisi itu bukan polisi 'tuntutan dibuat'; and (b) tindakan si mati menunggang motosikal tanpa lesen yang sah adalah perbuatan yang menyalahi undang-undang di bawah Akta Pengangkutan Jalan 1987 dan di bawah klausa pengecualian dalam polisi yang melayakkan responden untuk menafikan liabiliti. Dalam rayuan ini, perayu berhujah bahawa keputusan majistret adalah salah kerana: (i) kausa tindakan timbul apabila tuntutan itu ditolak oleh responden dan bukan pada tarikh kematian si mati dan oleh itu saman itu difailkan dalam had masa; and (ii) tidak mempunyai lesen yang sah untuk menunggang motosikal bukanlah punca langsung atau tidak langsung kematian si mati; Oleh itu, ianya tidak boleh menjadi alasan bagi responden untuk menafikan liabiliti di bawah polisi.

Diputuskan, menolak rayuan dan mengekalkan keputusan majistret:

(1) Polisi dalam kes ini adalah polisi insurans ganti rugi dan bukan polisi 'tuntutan dibuat' seperti yang dihujahkan oleh perayu. Polisi itu dengan jelas menyatakan bahawa kewajipan responden untuk membayar disebabkan oleh berlakunya peristiwa yang diinsuranskan, iaitu, kematian atau hilang upaya orang yang diinsuranskan akibat kecederaan oleh kemalangan. Manfaat akan dibayar apabila berlakunya peristiwa ini

tertakluk kepada terma dan syarat polisi. Sebaliknya, dalam polisi 'tuntutan dibuat', perlindungan diberikan apabila tuntutan dibuat terhadap orang yang diinsuranskan semasa tempoh polisi, tanpa mengira bila peristiwa yang menimbulkan tuntutan itu berlaku. Polisi insurans di sini tidak mempunyai klausa yang membolehkan tuntutan sedemikian. Fakta bahawa tuntutan perlu dibuat kepada penanggung insurans tidak boleh menukar polisi di dalam kes ini menjadi polisi 'tuntutan dibuat' (lihat perenggan 36–37).

(2) Majistret adalah betul dalam memutuskan bahawa kausa tindakan terakru pada tarikh kematian si mati akibat kemalangan itu pada 7 September 2016 dan bukan pada tarikh tuntutan itu ditolak oleh responden. Oleh itu, tuntutan perayu telah dihalang masa di bawah s 6 Akta Had Masa 1953 kerana saman itu difailkan hanya pada 29 September 2022 (lihat perenggan 43 & 45).

(3) Majistret adalah betul ketika memutuskan bahawa perbuatan si mati menunggang motosikal tanpa lesen yang sah pada masa kemalangan merupakan 'perbuatan yang menyalahi undang-undang' dalam peruntukan Pengecualian 1 polisi dan melayakkan responden untuk menafikan liabiliti (lihat perenggan 51).

(4) Frasa utama dalam Pengecualian 1 yang menyokong kedudukan responden adalah 'berkaitan dengan'. Frasa ini boleh ditafsirkan dengan luas. Ianya tidak memerlukan hubungan perkaitan secara langsung atau terdekat tetapi menunjukkan hubungan yang lebih umum. Frasa itu mencadangkan bahawa polisi itu bertujuan untuk mengecualikan daripada perlindungan bukan sahaja kematian yang disebabkan secara langsung oleh perbuatan yang menyalahi undang-undang tetapi juga kematian yang berkaitan dengan perbuatan yang menyalahi undang-undang dalam maksud yang lebih luas. Menunggang motosikal tanpa lesen yang sah adalah perbuatan yang menyalahi undang-undang di bawah Akta Pengangkutan Jalan 1987. Kematian itu turut berlaku semasa perbuatan menyalahi undang-undang itu sedang berlangsung. Dalam erti kata itu, kematian itu berkaitan dengan perbuatan yang menyalahi undang-undang. Menunggang secara haram dan kematian itu bukanlah peristiwa yang tidak berkaitan tetapi dikaitkan dengan batas waktu dan kebetulan secara persekitaran (lihat perenggan 52–54).

(5) Hujahan perayu bahawa kematian itu tidak berlaku secara langsung atau tidak langsung disebabkan oleh menunggang motosikal tanpa lesen, walaupun mempunyai logiknya, menyempitkan skop klausa pengecualian yang mempunyai bahasa yang mudah. Tafsiran perayu mengehadkan pengecualian kepada situasi di mana perbuatan menyalahi undang-undang secara langsung menyebabkan kematian, walaupun perkataan 'berkaitan dengan' sengaja digunakan. Tiada kekaburan dalam klausa pengecualian yang tidak memerlukan perbuatan yang menyalahi

undang-undang menjadi punca kematian; cukuplah dengan menunjukkan bahawa kematian itu berkaitan dengan perbuatan yang menyalahi undang-undang. Hubungan itu adalah jelas di sini (lihat perenggan 55 & 57–58).

(6) Majistret tidak terkhilaf kerana tidak mengguna pakai kebolehgunaan seksyen 7(3B) Akta Undang-undang Sivil (Pindaan) 2019 yang dituntut untuk tuntutan berkabungnya. Tiada keperluan bagi majistret untuk mempertimbangkan seksyen itu kerana ianya jelas tidak terpakai kepada tuntutan perayu yang berdasarkan pelanggaran kontrak oleh responden dan bukannya berdasarkan tort. Fakta bahawa tuntutan itu timbul daripada kematian si mati tidak mengubah sifat asas tuntutan sebagai kontrak (lihat perenggan 61, 71 & 73).

(7) Seksyen 7(3B) merujuk kepada penilaian ganti rugi di bawah perenggan (3)(A) yang menangani tuntutan ganti rugi bagi kecederaan peribadi akibat perbuatan tort. Keseluruhan tujuan s 7 tertumpu pada tuntutan tort. Tiada mana-mana dalam s 7(3B) atau bahagian s 7 yang mencadangkan bahawa ianya bertujuan untuk digunakan untuk tuntutan kontrak. Selain itu, s 7(3B) hanya terpakai kepada tuntutan tort di mana punca tindakan terakru adalah pada atau selepas 1 September 2019 (lihat perenggan 67–69).

(8) Majistret adalah dengan betul memutuskan bahawa perayu mempunyai priviti kontrak dengan responden (lihat perenggan 83).]

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Bank Bumiputra Malaysia Bhd v Mohamed bin Salleh [2000] 2 MLJ 412, CA (distd)

Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 6 MLJ 449, FC (refd)

Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd [2013] 3 MLJ 511; [2012] 1 LNS 830, CA (refd)

Poominathan a/l Kuppusamy v Besprin Stationers Sdn Bhd [2003] 3 MLJ 249, HC (distd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)

Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet [2007] 1 MLJ 163; [2006] 7 CLJ 541, HC (refd)

Woolley Development Sdn Bhd v Tiara Contours Construction Sdn Bhd [2016] 2 MLJ 861, CA (refd)

Legislation referred to

Limitation Act 1953 s 6(1)
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)
Societies Act 1966

Manoharan Malayalam (with Hariharan Manoharan) (M Manoharan & Co) for the appellant/ plaintiff.
Nagarajan Periasamy (with Vinoshni Narayanasamy and Fatin Nabihah bt Md Nor) (Nagarajan Peri & Co) for the respondent/defendant.

Wan Muhammad Amin J:

[1] This was an appeal by the appellant/plaintiff against the decision of the magistrate court on 5 April 2023 allowing the respondent/first defendant's application to strike out the appellant's claim under, inter alia, O 18 r 19(1)(a), (b), (c) and/or (d) of the Rules of Court 2012 ('the ROC') and the inherent jurisdiction of the court.

[2] For clarity and convenience, I will refer to the parties as they were in the magistrate's court.

SALIENT BACKGROUND FACTS

[3] The facts of this matter are largely not in dispute and they are as stated below.

[4] The plaintiff is the father of the late Thumilan a/l Chandirasekaran (the 'deceased') and the administrator of his estate.

[5] The first defendant is a Malaysian Indian Hairdresser Entrepreneurs Association registered under the Societies Act 1966. The defendant conducts hair dressing programmes and courses ('hairdressing course').

[6] According to the plaintiff, in 2016, after having completed the Sijil Pelajaran Malaysia examination, the deceased enrolled in a hairdressing course which was conducted by the first defendant under the SEDIC program (Socio-Economic Development of the Indian Community), by the Prime Minister's Department of Malaysia.

[7] It is not in dispute that the deceased had enrolled and participated in the hairdressing course with the first defendant.

[8] The first defendant pleads in its defence that the hairdressing course was

financed or paid by the government. There does not seem to be any dispute on this by the plaintiff.

[9] The first defendant had taken out a personal accident insurance policy known as 'PA Supreme insurance policy' ('the insurance policy') with the second defendant for all the students who enrolled in the hairdressing course with the first defendant and this includes the deceased.

[10] The students of the first defendant including the deceased are named as the nominee/insured under the insurance policy.

[11] The period of the insurance policy is for one year, from 29 February 2016 to 28 February 2017 and the sum insured by the defendant for each student is RM50,000.

[12] The first defendant avers that it applied for the insurance policy in good faith and was not under any mandatory obligation to do so.

[13] On 7 September 2016, on his way back from the first defendant's training institute, the deceased met with an accident and died at the scene.

[14] The plaintiff pleads that an insurance claim form called 'Personal Accident Claim Form' ('claim form') was submitted by him to the second defendant on 24 November 2016.

[15] However, vide a 'notice of repudiation' dated 26 July 2017 ('notice of repudiation') the second defendant rejected the insurance claim on the ground that the deceased had committed unlawful act under Exclusion No 1 of the insurance policy. The notice of repudiation, inter alia, states as follows:

> We wish to highlight that the deceased person did not possess a valid driving license at the material time of accident which constitutes a breach of Terms and Condition of your Personal Accident Supreme policy under Exclusion No: 1 which stipulates:
>
> > This Policy does not cover death or disablement directly or indirectly caused by arising from or in connection of the following: Suicide (whether felonious or not) or any attempt thereat or self-injury, pregnancy (Except Benefit 12) or childbirth, venereal disease or insanity, the effects or influence (temporary or otherwise) of alcohol or of drugs not prescribed by a qualified medical practitioner, the committing or attempt to commit *any unlawful act.*
>
> In view of the above, the claim does not fall within the ambit of policy coverage.

[16] Being dissatisfied with the second defendant's rejection of the insurance claim, the plaintiff then filed this action against the first and second defendants.

[17] The plaintiff's claim against the first and second defendants is for the sum insured under the insurance policy, RM50,000, *and* for bereavement amounting to RM30,000 pursuant to s 7(3B) of the Civil Law (Amendment) Act 2019.

THE FIRST DEFENDANT'S GROUNDS FOR STRIKING OUT THE PLAINTIFF'S CLAIM

[18] The first defendant's grounds in support of its application to strike out the plaintiff's claim (writ and statement of claim) are premised on the following:

(a) the appellant's action is time barred unders 6(1) of the Limitation Act 1953 as time runs from the date the deceased died, that is on 7 June 2016; and

(b) there is no nexus between the plaintiff's claim and the first defendant. The first defendant cannot be made liable for the second defendant's repudiation or rejection of the insurance claim under the insurance policy.

[19] Based on the above the first defendant contends that the plaintiff does not have a reasonable cause of action against the first defendant, that its claim is scandalous, frivolous and vexatious or is otherwise an abuse of the process of court (O 18 r 19(1)(a), (b), (c) and/or (d) of the ROC).

[20] Since the issue of limitation is directly linked to the plaintiff's cause of action and when it arose, it is therefore essential to first determine whether the plaintiff has a valid cause of action. If the plaintiff has no cause of action against the first defendant, then the issue of limitation does not arise.

WHETHER THERE IS A NEXUS BETWEEN THE PLAINTIFF'S CLAIM AND THE FIRST DEFENDANT (ISSUE OF PRIVITY)

[21] The following are undisputed facts which were also pleaded by the plaintiff:

(a) the deceased was a participant in the first defendant's hairdressing course;

(b) the first defendant applied for the insurance policy where the deceased was named as the insured;

(c) a claim (claim form) under the insurance policy was submitted to the second defendant arising from the fatal accident involving the deceased; and

(d) the second defendant rejected the insurance claim under the insurance policy pertaining to the deceased. A

[22] Therefore, based on the statement of claim the plaintiff's pleaded case against the first defendant is as follows: B

(a) the plaintiff's claim is based *entirely* on the *insurance claim* under the insurance policy which was rejected by the *second defendant* (para 18 of the statement of claim); and

(b) the nexus between the plaintiff's claim and the first defendant is based on the fact that the first defendant had *applied for* the insurance policy for the deceased (paras 7, 8 and 9 of the statement of claim). C

[23] Learned counsel for the plaintiff clearly takes the position that there was a contract between the plaintiff and the first defendant and that the plaintiff's claim against the first defendant is for beach of contract. This can be seen from, inter alia, paras 18 and 23 of the appellant's written submission (encl 19) where learned counsel for the plaintiff's submitted as follows: D

> 18. The Plaintiff submits that the *Plaintiff's statement of claim* and Defendant's Defence is *all about the breach of CONTRACT* and *nowhere in the Pleadings the Plaintiff raised a Tortious claim*. However, the learned Magistrate erred in law and facts and stated that the cause of action accrues from the date of the deceased DEATH. E
>
> 25. Therefore, the Plaintiff submits that the *cause of action* accrues on the date of the breach which was on 26.7.2017 and also where the right to sue the Defendant for *breach of contract* accrues from 26.7.2017. (Emphasis added.) F

[24] Therefore, it is clear that the plaintiff's claim against the first defendant is for *breach of contract only* and it is not based on tort, in that is it is not a tortious claim or a claim made under equitable principles. G

[25] The following facts cannot be disputed as there are no documents or averments to the contrary:

(a) there is *no agreement or contract* (written or otherwise) between the first defendant and the deceased; H

(b) the hairdressing course attended by the deceased was *sponsored/paid* by the government. The deceased did not pay to attend the course; and

(c) the insurance policy was purchased by the *first defendant* and the *premiums* were paid by it. I

[26] Based on the above, it is clear that there was *no* contractual relationship between the first defendant and the plaintiff.

[27] It is the plaintiff's case that the connection between the plaintiff and the first defendant is established via the insurance policy.

[28] In support of this contention learned counsel for the plaintiff had cited and placed heavy reliance on the following cases:

(a) *Bank Bumiputra Malaysia Bhd v Mohamed bin Salleh* [2000] 2 MLJ 412 (COA); and

(b) *Poominathan a/l Kuppusamy v Besprin Stationers Sdn Bhd* [2003] 3 MLJ 249 (HC).

[29] Whilst both the above cases involve a 'group insurance policy' similar to the insurance policy in the present case, however, they are distinguishable on the facts:

(a) in both *Mohamed Salleh* and *Poominathan*, the claimants/plaintiffs were *employees* of the defendant and it was held in both cases that there exists an employer and employee relationship between the parties;

(b) in *Poominathan* the respondent/defendant had made a claim under the insurance policy arising from the accident and personal injury sustained by the appellant/plaintiff. The respondent received RM25,000 but refused to pay the appellant that sum. In allowing the appellant's appeal and claim the High Court held that there was a *contract of employment* between the appellant and the respondent and that the appellant was the beneficiary under the policy. In the present case the first defendant did *not* receive any payment from the second defendant and *neither* was there a contract of employment between the plaintiff and the first defendant;

(c) in *Mohamed Salleh* which was referred to by *Poominathan*, a similar claim was made by respondent/plaintiff. The Court of Appeal held that the respondent was entitled to the insured sum of RM75,000 as it was specifically provided under the *contract of employment* between the respondent and the appellant/defendant. No such contract of employment exists in the present case; and

(d) the privity of contract argument by the defendants in both *Mohamed Salleh* and *Poominathan* were not accepted because of the contractual relationship that existed between parties.

[30] The importance of the existence of a contract of employment should *not* be undermined in both *Mohamed Salleh* and *Poominathan*. It is the contract of employment that gave the plaintiffs in both cases the right to claim against their employer/the defendants. This can be seen from the following passages from the Court of Appeal in *Mohamed Salleh*:

For the respondent Mr M Manoharan has cogently argued that his case does not

depend upon the doctrine of privity being resolved in his favour. He says that he is quite content to base his case on the contract of employment his client had with the appellant. *Under the terms of that contract*, according to counsel, *once the respondent suffered a permanent total disablement, an obligation arose on the appellant's part to make the requisite payment. This is because provision is made for such an event in the contract of employment.* He accordingly said that nothing was wrong in the way in which the learned judge approached the matter. *We find ourselves entirely persuaded by this argument.*

In our view there is, on the facts of this case, no necessity to resort to the device of a constructive trust. *We are satisfied that this is a straightforward case of a breach of contract.* The appellant has no answer to the respondent's claim for money due to him *under his contract of service*. The amount due to him is RM75,000 and medical expenses. The learned judge has directed the assessment of the latter by the registrar. (Emphasis added.)

[31] The same position was taken by the High Court in *Poominathan*, which referred to and applied the above principle outlined in *Mohamed Salleh*, and held as follows:

On this issue I hold that the labour officer erred in holding that the terms of employment was to be construed to that prevailing at the time of the appellant's employment in 1994. *In my view when the respondent took out the group insurance policy in favour of the named employees in 1996, this must be accordingly be interpreted to mean that the benefit of such a policy was an additional benefit of employment constituting a 'term' of employment to which the named employee was entitled to.* Any subsequent dispute relating to the payment of such benefit would accordingly, in my view, fall within the ambit of s 69 of the Act and that the labour officer accordingly had jurisdiction to entertain the appellant's claim. (Emphasis added.)

[32] In contrast, there are stark differences between the present case and that of *Mohamed Salleh* and *Poominathan*. They are as follows:

(a) there is no contract of employment between the plaintiff (the deceased) and the first defendant;

(b) in fact, there was no contractual relationship whatsoever between the plaintiff (the deceased) and the first defendant;

(c) the deceased merely attended the hairdressing course at the first defendant's institute;

(d) the hairdressing course was sponsored and paid for by the Government, and not the deceased;

(e) the first defendant purchased the insurance policy in good faith and was under no obligation (contractually or legally) to do so; and

(f) the first defendant did not receive any payment from the second defendant under the insurance policy.

[33] Hence, *Mohamed Salleh* and *Poominathan* do not support the plaintiff's case, and, on the contrary, are against it.

[34] The first defendant cannot be held liable for the acts of the second defendant especially when there is no nexus or privity of contract between the plaintiff and the first defendant (*Woolley Development Sdn Bhd v Tiara Contours Construction Sdn Bhd* [2016] 2 MLJ 861).

[35] How is it that the first defendant should be made liable to pay the sum insured under the insurance policy when the said policy is given by the second defendant. It is also not logical that the first defendant should pay for bereavement when it had nothing to do with the accident involving the deceased.

[36] I would further add that following the notice of repudiation the first defendant had even *appealed* vide letter dated 25 July 2017 to the second defendant to reconsider its decision. The first defendant stated, inter alia, in the said letter that it was awaiting the benefits of the insurance policy to be *paid* to the deceased *next of kin*.

[37] The first defendant, in the circumstances, acted beyond what was required and should not be blamed for the second defendant's decision to repudiate the insurance claim.

[38] In the circumstances, I am constrained to find the plaintiff's claim against the first defendant misconceived and obviously unsustainable (*Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36).

WHETHER THE PLAINTIFFS' CLAIM IS TIME BARRED

[39] Given that I have found that the plaintiff has no reasonable cause of action against the first defendant, the first defendant's defence of limitation is a moot point.

[40] In any event, the issue of limitation is only relevant in relation to the plaintiff's claim against the second defendant, and therefore, I do not find it appropriate to make any further observations on it.

CONCLUSION

[41] There were attempts made by the plaintiff to include '*the doctrine of agency*' but given that this was not pleaded, the learned magistrate was right to

have excluded it (*Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449).

[42] As stated earlier, the plaintiff has maintained on numerous occasions that his case is premised *solely* on a breach of contract. Hence, the plaintiff cannot be allowed to depart from his position.

[43] In the circumstances, I find that the plaintiff has no reasonable cause of action against the first defendant and that the plaintiff's claim against the first defendant is otherwise frivolous, vexatious or an abuse of the process of court (*Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet* [2007] 1 MLJ 163; [2006] 7 CLJ 541; *Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd* [2013] 3 MLJ 511; [2012] 1 LNS 830).

[44] That being the case, the learned magistrate was not in error in striking out the plaintiff's action against the first defendant

[45] For the reasons stated above, I dismissed the appeal, but in light of the plaintiff's predicament, I made no order as to costs.

Appeal dismissed and magistrate's decision affirmed.

Reported by Ashok Kumar